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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1062

FRITZ B. VAGGE, JOSEPH L. AVENT, et al., as Trustees of Dade County Construction Industry Advancement Trust,
Petitioners,
vs.
CAL KOVENS CONSTRUCTION CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1002

FRITZ B. WAGOR, JOHN L. AVANT, et al., as Trustees of Dade County Construction Industry Advancement Fund,
Petitioners,

vs.

CAL KOVENS CONSTRUCTION CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

For the purposes of continuity, your respondent will refer to the parties and to the record by the same designations as indicated by the petitioners in the petition for writ of certiorari. Petitioners Fritz B. Wagor, John L. Avant, et al., as Trustees of Dade County Construction Industry Advancement Fund will be referred to as "petitioners" or

"Trustees". Respondent, Cal Kovens Construction Corporation, will be referred to as "Kovens." The Carpenters' District Council of Miami, Florida and Vicinity will be referred to as the "Union", and South Florida Chapter, The Associated General Contractors of America and Home Builders Association of South Florida will be collectively referred to as the "Associations." References to the record will be by the symbol "R", Volume number and page.

THE PETITION FOR CERTIORARI

The petitioners urge that certiorari should be granted in this cause for the reason that the opinion of the Fifth Circuit Court of Appeals tends to create instability in the construction industry, and in effect condones a criminal violation of the Labor-Management Relations Act, 29 USCA § 186. This same argument was advanced to the Court of Appeals on appeal from the decision of the United States District Court, Southern District of Florida. The Court of Appeals, by its opinion, rejected these contentions. Your respondent believes that on analysis this Court will reach the conclusion that the Court of Appeals' decision is eminently correct.

STATEMENT OF FACTS

In July, 1963, the Union and the Associations entered into a collective bargaining agreement (R., Vol. I, 19-32). Kovens was not, at any time pertinent to these proceedings, a member of either of the Associations, and never designated either of the Associations as its bargaining representative in connection with its dealings with the Union (R., Vol. I, 38).

The collective bargaining agreement itself recognizes that the Associations did not have the power or authority to

bind all general contractors in the South Florida area to said agreement. The collective bargaining agreement states:

> "For the purposes of this agreement the term 'employer' shall mean the person, firm or corporation *agreeing* to be bound by the terms of this agreement." (R., Vol. I, 29).

On the signature page of the collective bargaining agreement a space was provided for the Associations to sign as the designated bargaining representatives of its members. A space was provided for the signatures of other non-member employers who wished to accept the agreement (R., Vol. I, 33).

Kovens denied that it had ever executed or accepted the collective bargaining agreement (R., Vol. I, 9 and 16). The petitioners admitted that they did not have a copy of the collective bargaining agreement which had been signed by Kovens (R., Vol. I, 38). The employer Associations inserted in the collective bargaining agreement an article designated "Industry Promotion Fund," in which it was provided that employers were to contribute to said Fund a certain amount per hour per Union carpenter employed. This Fund is administered solely by trustees appointed by the Associations and is wholly controlled by the Associations (R., Vol. I, 29-30). The creation of such Fund was not requested or required by the Union in connection with its collective bargaining with the Associations. The Union stated that contributions to the Industry Promotion Fund was not a condition precedent, insofar as the Union was concerned, to the employment of Union labor (R., Vol. I, 15). The respondent has never contributed to such Industry Promotion Fund.

This cause was originally filed in the United States District Court, Southern District of Florida, seeking to re-

quire Kovens to make contributions to the Associations' Industry Promotion Fund. The United States District Court, Southern District of Florida, granted summary judgment for Kovens. The Court of Appeals, Fifth Circuit, affirmed that decision with opinion.

ARGUMENT IN OPPOSITION TO PETITION

(a) A New Labor Policy—

The thrust of petitioners' argument is that this Court should formulate a national labor policy that all employers in a designated industry should be required to be bound by the terms of a collective bargaining agreement negotiated by an industry association, even though certain employers are not members of the association and have not designated the association as its bargaining representative. No better rebuttal argument can be made to the petitioners' position than that contained in the opinion of the Court of Appeals, Fifth Circuit, in this cause, in which that Court held:

> "Adverting to the duty of the lower court to fashion the substantive law of this case from the policy of our national labor laws, as taught by *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1959) and its progeny, appellants complain that its decision herein undermines the industrial stability achieved through employer associations. They contend that there is a federal labor policy favoring multi-employer associations as collective bargaining units and that uniform conditions of employment are essential to their continued existence. Thus, their argument runs, they must be clothed with quasi-legislative authority to impose their collective bargaining agreements upon non-consenting employers within the industry.
>
> "While there is nothing in the national labor laws reflecting adversely upon the existence of such units, *Labor Board* v. *Truck Drivers Union,* 353 U.S. 87 (1957),

there is nothing which has been called to our attention, or which we have found, which prefers them to a non-member employer choosing to go it alone in negotiating with a labor union. Indeed, the signposts point in the opposite direction. For example, in *Terminal Assn.* v. *Trainmen,* 318 U.S. 1, 7 (1943). it was observed:

> " 'The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. . . . The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.'
>
> "Again, in *Labor Board* v. *American Ins. Co.,* 343 U.S. 395 (1952), the Supreme Court made it clear that section 8(a) of the Labor-Management Relations Act (29 U.S.C.A. § 158(d)) does not permit either the government or a union to impose unilaterally on an employer certain terms and conditions of employment. It follows, a fortiori, that it does not suffer the unilateral imposition of contractual obligations by an association of employers upon a nonmember, competing employer.
>
> "Any federal policy favoring the multi-employer bargaining unit over the individual employer electing to act alone or promoting uniform terms and conditions of employment for an entire industry must await its promulgation by the Congress. It cannot and must not be postulated by this court."

(b) Alleged Criminal Violation—

The argument of the petitioners, that the decision of the Court of Appeals, in effect, sanctions a criminal violation of § 302 of the Labor-Management Relations Act, 29 USCA § 186, is again answered by the opinion of the Court

of Appeals, Fifth Circuit, in this cause, wherein the Court held:

> "Insisting that payments made by Kovens into the Health and Welfare Fund under its informal agreement with the Carpenters' Union were in patent violation of 29 U.S.C.A. § 186, appellants urge us to absolve it of criminality by holding that in law, if not in fact, it became a party to the written agreement negotiated by the Associations with such Union. The mere statement of this contention points up its lack of merit; it deserves no fuller discussion."

In addition, your respondent in no way concedes that its actions have in any way violated 29 USCA § 186.

(c) Is Failure to Contribute a Breach of Contract—

The petitioners urge that failure to require Kovens to contribute to the Industry Promotion Fund sanctions a breach of the collective bargaining agreement between the Union and the Associations. The agreement provides, in paragraph 2 of article VIII, as follows:

> "The Parties hereby agree that the terms and conditions set forth in this Agreement shall be the same with any Employer irrespective of their membership or non-membership in said Associations; and no more favorable terms or conditions will be given to any employer during the term of this Agreement." (R., Vol. I, 27).

The Court of Appeals' answer to this argument was:

> "Finally, relying upon the above-quoted provisions of article VIII of their agreement with the Carpenters' Union, appellants argue that failure to require Kovens to contribute to the Industry Fund as a condition of its employment of union labor resulted in giving to it 'more favorable terms or conditions' and constituted a clear breach of such agreement. But assuming,

without deciding, that this is so, it does not follow that a breach of its contract by the Union may be transmuted into a contractual obligation which appellee expressly declined to assume."

In addition, there is no showing in this record that the above quoted provision has been breached in any way by the Union. The Union is charging Kovens the same wage scale and fringe benefits as are required to be paid by the Associations' members under the Associations' agreement with the Union. The only thing that Kovens is not paying, that the Associations' members are paying, is the money that goes into the Associations' private Industry Promotion Fund. As stated before, payment into the Industry Promotion Fund was never a requirement, nor even a request, of the Union in connection with fixing the wage scale and fringe benefits the Union was willing to accept in its collective bargaining with the Associations, and it is not a prerequisite demanded by the Union for the employment of Union labor. It is a tribute sought to be exacted by an industry association for its private benefit from non-members.

CONCLUSION

The Court of Appeals, in its opinion, only decided that this respondent-employer was not required to contribute to the Associations' promotion fund, since it was not a member of the Associations, and had neither designated the Associations as its bargaining representative nor executed the agreement made by the Associations and the Union.

There can be no more validity to petitioners' position in attempting to force respondent to contribute to its Industry Promotion Fund than if the respondent and other

non-Association member employers signed an agreement with the Union providing that employers shall pay into the "Kovens Promotion Fund" five cents per hour for every Union carpenter employed, and then sued the Associations to require contributions. The fallacy of their position is apparent.

It is respectfully submitted that the petition for writ of certiorari is without merit and should be denied.

Respectfully submitted,

.....

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing brief in opposition to petition for writ of certiorari was furnished (by mail) to the petitioners' attorneys, Messrs. Paul and Sams, 1314 First National Bank Building, Miami, Florida 33131, on February ....., 1968.

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ROBERT C. WARD